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No. 91-1462

In The

Supreme Court of the United States

October Term, 1991

JON G. MURRAY, and
SOCIETY OF SEPARATIONISTS, INC.,

Petitioners,

vs.

CITY OF AUSTIN, TEXAS,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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LIST OF ALL PARTIES

JON G. MURRAY, and
THE SOCIETY OF SEPARATIONISTS, INC.
Petitioners and Plaintiffs below.

THE CITY OF AUSTIN, TEXAS
Respondent and Defendant below.

City of Austin is the only Respondent and Defendant. Travis County has never been made a party to this lawsuit.

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REASONS FOR DENYING THE WRIT

Petitioners Jon G. Murray and Society of Separationists, Inc. (hereafter "Murray") are urging this Court to adopt a "per se" rule to Establishment Clause challenges. This is contrary to this Court's controlling precedent. As to all of Murray's issues, asserting the existence of a purported conflict among the circuits about the constitutionality of a permanent display of a Christian cross in governmental insignia, the precedent of this Court supports the Fifth Circuit's holding the case sub judice that such cases must be decided on their facts.

I.

CIRCUIT'S DECISION BELOW DOES NOT PRESENT A GENUINE CONFLICT BETWEEN IT AND THE OTHER CIRCUITS AS ANY PERCEIVED CONFLICT IS DUE TO FACTUAL DISTINCTIONS IN THE CASES WHICH DICTATE DENIAL OF THE WRIT.

Both the circuit and district courts in this case have rejected Murray's contention that the inclusion of a cross in the municipal insignia of the City of Austin violates the Establishment Clause of the First Amendment of the United States Constitution. The Fifth Circuit's decision differs from two other circuit cases which held the display of religious symbols including a cross on municipal seals is violative of the Establishment Clause. *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991), petition for cert. filed (U.S. July 19, 1991), and *Friedman v. Board of County Commissioners of Bernalillo County*, 781 F.2d 777 (10th Cir. 1985). However, the Fifth Circuit decision is proper under controlling precedent emanating from this Court that such cases must be decided on their facts.

There is not a conflict among the circuits. Moreover, the circuit and district courts correctly rejected Murray's contention that any display of a cross by a governmental entity would violate the Establishment Clause. Petition, p. 16. For these and other reasons delineated below, Murray's petition for writ of certiorari should be denied.

A. ALL THE CIRCUITS AGREE THAT NO HARD AND FAST RULE CAN BE APPLIED WHENEVER A RELIGIOUS SYMBOL IS DISPLAYED BY A GOVERNMENTAL ENTITY.

Murray's claim that the circuit court below erred in relying on *Marsh v. Chambers,* 463 U.S. 783 (1983) (legislative opening prayer) and *Lynch v. Donnelly,* 465 U.S. 668 (1984) (Holiday creche display) contravenes the guiding case law set forth by this Court. Murray alleges that only the test in *Lemon v. Kurtzman,* 403 U.S. 602 (1971), specifically the "effects" prong, should be applied to this case. Murray asserts the insignia's primary effect is to advance Christianity. Petition, p. 14.

In accordance with this Court's position in *Lemon v. Kurtzman,* 403 U.S. 602, 614 (1971), *Lynch v. Donnelly,* 465 U.S. 668, 678 (1984), *County of Allegheny v. ACLU,* 109 S.Ct. 3086, 3102 (1989), and *Marsh v. Chambers,* 463 U.S. 783 (1983), that Establishment Clause cases should be decided on their individual facts, the Fifth Circuit properly found factual distinctions between Austin's insignia and the seals struck down by the other circuits which necessitated a decision in favor of the City of Austin:

> In holding that Austin's insignia does not violate the First Amendment, we recognize that two of our sister circuits have found establishment clause violations when municipal seals included religious symbolism. We do not view this as a split with our circuit. Instead, it is further evidence, as discussed in *Lynch,* for example, that such cases must be decided on their facts. (Pl. App. B, pp. 56-57).

In determining what is constitutional under the Establishment Clause, this Court states that "the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all circumstances of a particular relationship." *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). Similarly, in considering Establishment Clause challenges, no fixed, *per se* rule can be framed. *Lynch v. Donnelly*, 465 U.S. 668, 678. Contrary to Murray's request to adopt a hard and easily applicable rule to be applied whenever a religious symbol is displayed by a governmental entity, this Court has continuously refused to draw a straight and unwavering line and, instead, considers each individual situation in light of its factual nuances. Thus, Establishment Clause challenges which present seemingly similar scenarios have often been decided differently because of significant factual distinctions. *County of Allegheny v. ACLU*, 109 S.Ct. 3086, 3102 (1989), is a clear example.

In *County of Allegheny v. ACLU*, 109 S.Ct. 3086, 3102 (1989) this Court held that in determining whether a government's use of religious symbolism has the unconstitutional effect of endorsing religious beliefs, the inquiry must focus upon the context in which the contested object appears. At issue in *County of Allegheny* was the public holiday display of a creche and a Jewish menorah. After examining the physical context in which each item was displayed, the Court upheld the display of the menorah but struck down the creche display. The Court explained its seemingly conflicting decisions by focusing on the factual distinctions between the display of the menorah and that of the creche.

The menorah was placed outside the Allegheny City-County Building next to a Christmas tree and was accompanied by a sign entitled "Salute to Liberty." Since the menorah was displayed along with other secular articles, the context of the display was such that the menorah itself did not have the effect of promoting or endorsing religious beliefs and was therefore permissible under the Establishment Clause. *Id.* at 3115.

In contrast, the Court held that the display of a creche inside the courthouse did have an impermissible effect under the Establishment Clause. *Id.* at 3104. The creche, which was placed on the grand staircase of the courthouse, depicted a nativity scene and contained at the crest of the manger, a banner proclaiming "Gloria in Excelsis Deo," meaning "Glory to God in the Highest." Attached to the creche was a sign indicating that the creche had been donated by the Holy Name Society, a Roman Catholic group. In striking down the display, the Court reasoned that, unlike the context in which the menorah was presented, the context of the creche display did not neutralize the religious message conveyed by the creche itself. Therefore, the message endorsed by the creche was clearly religious in nature and thus, impermissible. *County of Allegheny,* 109 S.Ct. at 3104.

Not surprisingly then, circuit courts have reached different constitutional conclusions with seemingly similar religious symbols based on the guiding principles of *Lemon, Allegheny,* and its progeny. Murray over-generalizes the holdings of the other circuits regarding the display of a Christian cross by a governmental entity under any circumstances.

In *Harris* and *Friedman*, the circuit courts applied the reasoning of *Lemon*, *County of Allegheny*, and its progeny. In *Harris*, the Seventh Circuit held unconstitutional the municipal seals of the cities of Zion and Rolling Meadows, Illinois. Zion's seal contained images of a cross, shield, sword, scepter, dove, crown and a ribbon which read "God Reigns." In striking down the seal, the Seventh Circuit stated that the images on it were "the most dominant and recurring images of Christianity." *Harris*, 927 F.2d at 1414 (emphasis added). It also stated that "nothing within the four corners of Zion's seal, emblem or logo detracts from their sectarian message." *Id.* at 1415. The same Circuit struck down the seal of Rolling Meadows on similar grounds. The seal contained images of a water tower, two buildings, a leaf and a large Christian cross in front of a church. In striking down the seal, the Court stated that "although we agree that the context surrounding the challenged image is crucial, we do not agree that the particular context in this case – the other images on the seal – save the cross on the seal from an unconstitutional endorsement of Christianity." *Id.* at 1412.

The cross on the municipal seal struck down by the Tenth Circuit in *Friedman* was also insufficiently neutralized by secular symbols. This seal contained the Spanish motto "Con Esta Vencemos" (With This We Conquer) over a large predominate Latin cross, highlighted by rays of light. The cross is on a plain above a set of mountains. Sheep are standing on the plain. The Tenth Circuit concluded that the cross was not neutralized by its context because the cross was "the only visual element of the seal . . . [and] The motto may be fairly regarded as

promoting the religion the cross represents." *Friedman*, 781 F.2d at 782. None of the circuit courts have adopted the proposition set forth by Murray that any display of a religious symbol or Christian cross is "per se" violative of the Establishment Clause.

Although the insignia of the City of Austin contains a cross, the insignia differs from those seals at issue in *Harris* and *Friedman* for a number of reasons. First, Zion's seal contained the message "God Reigns" and the seal in *Friedman* carried the message "Con Esta Vencemos." In contrast to these seals, Austin's insignia does not contain any explicit religious message. In this sense, the insignia does not put forth the same express endorsement of religion that is conveyed by the seals struck down by the Seventh and Tenth Circuits. Secondly, unlike the seals in *Harris* and *Friedman*, Austin's insignia contains images that are not in equal dimension to one another. Specifically, the insignia contains images of a lamp, the State Capitol Building, and a cross surrounded by wings. The lamp represents the fact that Austin is the center of education; the building represents the State Capital, which is located in Austin; and the cross between two wings represents a modification of the historical coat-of-arms of Stephen F. Austin, the "Father of Texas." The cross is smaller than the other two images and does not dominate the insignia. Thirdly, any religious endorsement offered by the cross is balanced and neutralized by the other secular symbols on the insignia. This neutralizing context is absent in the municipal seals at issue in *Harris* and in *Friedman*.

Further, in evaluating the context in which a religious symbol is presented, the Court considers not only the

physical characteristics of the presentation but the historical and ceremonial features of the display as well. As Justice O'Connor points out in her concurrence in *County of Allegheny,* the ["history and ubiquity" of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion."] *County of Allegheny,* at 3121.

Austin's insignia was adopted by the Austin City Council in 1919. The insignia's current form is a modification of the family coat-of-arms of Stephen F. Austin, the founder and namesake of the City of Austin. The crest that appears on the insignia was originally used in the Austin family coat-of-arms to indicate that an ancestor had participated in a crusade. Since its adoption, the insignia has been prominently and permanently displayed on all types of municipal property including vehicles, buildings, paper and pens.

In deference to the U. S. Supreme Court's position in both *Marsh* and *County of Allegheny* that "history and ubiquity" be considered in evaluating the public display of religious symbols, the Fifth Circuit properly recognized what it called the "long-standing, unique history" of Austin's insignia and affirmed its constitutionality. (Pl. App. B, p. 55).

In so doing, the Fifth Circuit followed this Court's position of analyzing Establishment Clause challenges not only in light of the three-part *Lemon* test but in reference to other factors such as historical significance. As Justice Burger states in *Lynch,* this Court has "repeatedly emphasized [its] unwillingness to be confined to any

single test or criterion in this sensitive area." *Lynch* at 1362. Consequently, although the *Lemon* test is often employed in Establishment Clause cases, it is not determinative. In fact, in certain instances, for example *Marsh v. Chambers*, 463 U.S. 783 (1983) and *Larson v. Valente*, 456 U.S. 228 (1982), the *Lemon* test was not used at all in keeping with this Court's intent to consider Establishment Clause challenges on their specific facts without regard to any set criteria.

Consequently, there is no conflict between the decisions reached by the Fifth, Seventh and Eleventh Circuits and is due only to factual distinctions in the cases before each court; and as such does not warrant review by this Court.

II.

THE DECISION OF THE COURT OF APPEALS CONCERNS ONLY ISSUES OF FEDERAL LAW WHICH HAVE BEEN SETTLED BY THIS COURT, NAMELY THE CONSTITUTIONALITY OF THE DISPLAY OF CHRISTIAN CROSSES AND OTHER RELIGIOUS SYMBOLS BY A GOVERNMENTAL ENTITY.

Murray's next category of circuit court opinions are cited for the proposition "[that] The decision of the court of appeals below raises significant and recurrent problems concerning the constitutionality of a permanent display of sectarian religious symbols including Christian crosses in official government seals, insignia, or logos." Petition, pp. 21-23. The Respondent is responding to Murray's arguments two and three in this point. For several reasons, however, Murray's arguments do not merit certiorari review.

First, Murray asks the Court to simply strike down all such displays under the Establishment Clause. While this is an action that would draw a definite fixed *per se* rule, it is also an action that this Court has repeatedly refused to take. Indeed, according to the position taken by this Court in *Lemon*, *Lynch*, and *County of Allegheny*, it is well settled that Establishment Clause cases should be considered individually on all the circumstances of a particular relationship. The Fifth Circuit followed this underlying premise and declined to hold that any time a municipality incorporates a religious symbol within its seal, insignia, or logo – regardless of the history, purpose, or context – the Establishment Clause is violated. (Pl. App. B, p. 56).

Murray argues that the Fifth Circuit is the only federal court that has tolerated religious symbols in public displays, especially Christian crosses. Murray urges the Court to adopt a bright line rule which would ostensibly reconcile these cases by simply prohibiting all public displays of crosses. Again, according to *Lynch* and *County of Allegheny*, this is an action that the Court has refused to take.

Moreover, the cases cited by Murray can be distinguished from the case sub judice. With respect to *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1984), Murray states that the Tenth Circuit held unconstitutional a government seal that contained a depiction of a Morman temple. This assertion is simply wrong. On the contrary, the Tenth Circuit held that this determination was a factual question and remanded the case to the trial court for determination. If anything, *Foremaster* supports this Court's position that Establishment challenges should be

decided on their individual facts. Petitioner also cites *Saladin v. City of Milledgeville,* 812 F.2d 687 (11th Cir. 1987). Similar to *Harris* and *Friedman, Saladin* involved a city logo that contains an explicit endorsement of religion, the word "Christianity." Austin's insignia hardly contains such an explicit endorsement of religion.

Similarly, those cases cited by Murray involving Christian crosses displayed in public parks and upon public buildings are also factually distinguishable from the case sub judice. All of the cases involve the display of a cross without any secular symbols or insufficient secular symbols. See, *ACLU v. Rabun County Chamber of Commerce,* 698 F.2d 1098 (11th Cir. 1983) (20-foot lighted cross in park presented with no secular symbols); *ACLU v. City of St. Charles,* 794 F.2d 265 (7th Cir. 1986) (18-foot cross on government building presented with no secular symbols); *Gilfillan v. City of Philadelphia,* 637 F.2d 924 (3rd Cir. 1980) (36-foot cross presented with no secular symbols); *Jewish War Veterans of United States v. United States,* 695 F.Supp. 3 (D.D.C. 1988) (65-foot lighted cross presented with no secular symbols); *ACLU v. Mississippi State GSA,* 652 F.Supp. 380 (S.D. Miss. 1987) (cross not sufficiently neutralized by secular symbols around it); *Libin v. Town Greenwich,* 625 F.Supp. 393 (D. Conn. 1985) (cross presented with no secular symbols); *Greater Houston Chapter of ACLU v. Eckles,* 589 F.Supp. 222 (S.D. Tex. 1984), appeal dismissed, 795 F.2d 426 (5th Cir.), cert. denied, 474 U.S. 980 (1985) (Star of David and Christian cross displayed in park with no symbols of other religions practiced in the community).

Although some circuit courts have found Christian crosses displayed by public entities unconstitutional,

Murray's assertion that there are significant and recurring problems which should be settled by this court overstates the problem because these cases involve physically large crosses that are displayed either without secular symbols or with insufficient neutralizing secular symbols. These decisions present factual circumstances strikingly different than those presented by Austin's insignia. As such, certiorari should be denied.

CONCLUSION

Unless this Court at Murray's urging takes the position that all municipal seals or insignias containing religious symbols are unconstitutional *per se*, a view it has thus far refused to adopt, the Fifth Circuit's decision based on a factual review, case-by-case, is proper and the petition for writ of certiorari should be denied.

Respectfully submitted,

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